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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

BRET BAILEY OWENS,

Defendant and Appellant.

C070570

(Super. Ct. No. TF035604B)

On appeal, defendant Bret Bailey Owens challenges his sentence of six years in prison pursuant to a plea agreement after he violated probation. He further contends the trial court abused its discretion in denying his motion to withdraw his guilty plea. Finding no merit in defendant's arguments, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2009, defendant was charged with assault with a deadly weapon and second degree robbery along with two sentence enhancements: 1) personal use of a firearm (10 years; former Pen. Code, § 12022.53, subd. (b)); and 2) being armed with a

firearm during the commission of a felony (one year; Pen. Code, § 12022, subd. (a)(1)).

On January 25, 2011, defendant pled guilty to the robbery charge and admitted the armed with a firearm enhancement in exchange for dismissal of the assault charge and the personal use enhancement. The details of the plea agreement are convoluted and unconventional:

"[Defense counsel]: So it -- it's understood that he's going to get the six years in prison if he fails to -- if he runs from Delancey Street or fails to complete the program.

"It's also his understanding for committing the robbery, that if Delancey doesn't take him, he's just going to do four years state prison, and that this is going to be true, that it is one strike.

"And I'll let the clerk recite the enhancement that he's admitting to.

"[¶] . . . [¶]

"THE COURT: Okay. What'd I'd like to do with Mr. Owens today is today to sentence him to the four years state prison, which will be the mid term of three, but hold off execution.

"I'll release him to your custody to Delancey Street and then we'd come back. And then we can talk about if I'm going to say the upper term of six or if it's still going to be the four at that time.

"[Defense counsel]: That's --

"[The Court:] But I'd like to impose the sentence here if I'm going to do that.

"[¶] . . . [¶]

"[The Court:] Mr. Owens, at this time, with regard to [the robbery charge], you'll receive the mid term of three years in state prison, to run consecutive to the enhancement, pursuant to Penal Code Section 12022, Subdivision (a), Subdivision (1), of one year, for a total sentence of four years state prison.

"[¶] . . . [¶]

"[The Court:] And then we'll come back on February 15th at 8:30 back in this department. And that will be for possible modification of sentence at that time, Mr. Owens."

In effect, then, the plea agreement was that if defendant was accepted into the Delancey Street program¹, the court would sentence him to the upper term of five years for the robbery, plus one year for the firearm enhancement, but would suspend execution of the sentence and place him on probation so that he could participate in the program. If the program did not accept him, then he would be sentenced to the middle term of three years for the robbery, with one year for the enhancement, and he would not be placed on probation at all. Defendant said that he understood and agreed to the terms of the plea agreement. He entered a guilty plea to second degree robbery and admitted the one-year enhancement. Defendant's counsel did not object.

Defendant was accepted into the Delancey Street program. On February 24, 2011, the court sentenced him to the agreed upon

¹ Delancey Street is a residential substance abuse program.

six-year term, stayed the sentence, and ordered him to report to Delancey Street as a condition of his probation. Defendant made no objection at this second sentencing. Defendant left the Delancey Street program after two weeks and failed to report to his probation officer. Consequently, the court revoked his probation, lifted the stay, and ordered the term of six years executed.

On August 23, 2011, defendant filed a motion to withdraw his guilty plea on the basis of inadequate assistance of counsel. On February 3, 2012, a hearing was held on the motion. Defendant argued that his counsel, Vittoria Bossi, misinformed him about the length of the personal use enhancement, which was dismissed. Further, he claimed that counsel failed to reinvestigate his case, instead relying on the investigation conducted by his previous counsel, Kristine Eagle. Bossi agreed with defendant on both points. The trial court heard the motion and denied it without a credibility finding. This timely appeal followed.

DISCUSSION

I

The Plea Agreement/Benefit Of The Bargain

Defendant argues that when the trial court "formerly sentenced [him] to a term of four years in state prison and suspended execution of that sentence the court was no longer empowered to impose a six year sentence." Defendant relies on *People v. Karaman* (1992) 4 Cal.4th 335 for the contention that the trial court lacks jurisdiction to increase a sentence after

judgment has been entered into the clerk's minutes. Even if defendant is correct, however, defendant is estopped from complaining on appeal that the trial court acted in excess of its jurisdiction because the court acted pursuant to the terms of the plea agreement defendant willingly entered into. A litigant who has stipulated to a procedure in excess of jurisdiction may be estopped to question it when, "[t]o hold otherwise would permit the parties to trifle with the courts.'" (*In re Griffin* (1967) 67 Cal.2d 343, 347-348.) "The rule that defendants may challenge an unauthorized sentence on appeal even if they failed to object below is itself subject to an exception: Where the defendants have pled guilty in return for a *specified* sentence, appellate courts will not find error even though the trial court acted in excess of jurisdiction in reaching that figure, so long as the trial court did not lack *fundamental* jurisdiction. The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to trifle with courts by attempting to better the bargain through the appellate process." (*People v. Hester* (2000) 22 Cal.4th 290, 295.)

Defendant faced one count of assault with a deadly weapon and one count of second degree robbery along with two sentence enhancements. Defendant was leniently granted the opportunity to apply to the Delancey Street program in exchange for pleading guilty to the robbery charge and one-year enhancement. Under the terms of the plea agreement, he would get four years in prison if the program did not accept him, and would have to

begin serving that term immediately, or he would get six years in prison if the program accepted him, but he would be given probation and an opportunity to avoid serving that term by successfully completing the program. He accepted the bargain without objection and was accepted to Delancey Street. The assault with a deadly weapon charge was dismissed, as was the 10-year personal use enhancement. Defendant and his counsel were both aware that violating probation would result in six years in prison. He violated probation nonetheless. He reaped the benefits of his bargain. Accordingly, defendant is estopped from challenging the procedural irregularity in the imposition of his six-year sentence.

II

Motion To Withdraw Guilty Plea

Defendant contends the trial court abused its discretion by refusing to allow him to withdraw his guilty plea. He argues that he received "improper advice and that trial counsel had conducted an inadequate investigation of his case." We disagree.

Penal Code section 1018 provides that at any time before judgment, the court may, "for good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. . . . This section shall be liberally construed to effect these objects and to promote justice." Case law implementing Penal Code section 1018 establishes a more stringent standard for overturning a guilty plea. Courts have found that "'pleas resulting from a bargain should not be set

aside lightly and finality of proceedings should be encouraged.'" (*People v. Weaver* (2004) 118 Cal.App.4th 131, 146.) A defendant who seeks to withdraw a plea has the "burden to produce evidence of good cause by clear and convincing evidence." (*People v. Wharton* (1991) 53 Cal.3d 522, 585.) In order to show good cause a defendant must demonstrate, "[m]istake, ignorance or any other factor overcoming the exercise of free judgment." (*People v. Cruz* (1974) 12 Cal.3d 562, 566.) Appellate review of a trial court decision on a motion to withdraw a guilty plea is similarly narrow. According to our Supreme Court, a "claim of an erroneous denial of a motion to withdraw a plea is reviewed for abuse of discretion." (*People v. Holmes* (2004) 32 Cal.4th 432, 442-443.)

Here, defendant maintains that he was unable to knowingly and intelligently plead because defense counsel incorrectly informed him that the personal use enhancement charged against him carried a 20-year term, when it actually carried a 10-year term. He argues that because he was "misadvised as to the potential exposure in the case should the matter have gone to trial," he "did not enter a knowing and intelligent plea."

The evidence showed that defendant discussed several viable alternatives with defense counsel, including the Delancey Street program. He wrote a letter to Delancey Street explaining why he should be selected to participate. The possibility of receiving a 20-year gun enhancement was not included as a reason in the letter. Moreover, because defendant sought to withdraw his guilty plea only after he knowingly violated his probation and

was faced with a definite prison sentence, the trial court could have reasonably found that defendant's contention that he took the plea because of the 10-year mistake in his attorney's advisement to him was not credible. Accordingly, defendant has failed to show an abuse of discretion in the denial of this motion on this basis.

Defendant also states that his counsel failed to reinvestigate his case after his former counsel had previously investigated the matter. Although defendant does not expressly argue ineffective assistance of counsel in his brief, defense counsel's failure to investigate would ordinarily fall within the scope of an ineffective assistance of counsel argument. To establish ineffective assistance of counsel, defendant must demonstrate that counsel's performance was deficient and that defendant suffered prejudice as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692 [80 L.Ed.2d 674, 693, 696]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

Here, defendant's previous counsel had used a private investigator to contact the victim. The investigator reported that the victim "was not willing to speak to the defense." The investigator's report stated that upon interviewing the victim's father, it was "confirmed that [the victim] would not be meeting with defense counsel." The victim did not testify at the preliminary examination. Defendant's counsel eventually hired an investigator of her own who contacted the victim and allegedly discovered that he was willing to "talk." The trial

court could have reasonably concluded that even if the victim was willing to speak to the defense, there is no evidence of what the victim would have actually said, and therefore, no evidence that defense counsel's failure to reinvestigate was prejudicial to the defendant. The trial court did not abuse its discretion.

Defendant's final contention that his counsel failed to inform him that his codefendant received a grant of probation is equally unavailing. Defendant himself was offered probation. He accepted the offer. He then went on to willingly violate the terms of probation. The trial court could have reasonably concluded that whether his codefendant received probation had no bearing on defendant's decision to plead guilty in this case. For the foregoing reasons, we find no abuse of discretion in the trial court's denial of defendant's motion to withdraw his guilty plea.

DISPOSITION

The judgment is affirmed.

ROBIE, Acting P. J.

We concur:

BUTZ, J.

DUARTE, J.